

JOHN F. KERRY, MASSACHUSETTS, CHAIRMAN
CHRISTOPHER S. BOND, MISSOURI, RANKING MEMBER

CARL LEVIN, MICHIGAN
TOM HARKIN, IOWA
JOSEPH I. LIEBERMAN, CONNECTICUT
PAUL D. WELLSTONE, MINNESOTA
MAX CLELAND, GEORGIA
MARY LANDRIEU, LOUISIANA
JOHN EDWARDS, NORTH CAROLINA
MARIA CANTWELL, WASHINGTON
JEAN CARNAHAN, MISSOURI

CONRAD BURNS, MONTANA
ROBERT F. BENNETT, UTAH
OLYMPIA J. SNOWE, MAINE
MICHAEL ENZI, WYOMING
PETER G. FITZGERALD, ILLINOIS
MIKE CRAPO, IDAHO
GEORGE ALLEN, VIRGINIA
JOHN ENSIGN, NEVADA

PATRICIA R. FORBES, MAJORITY STAFF DIRECTOR AND CHIEF COUNSEL
EMILIA DISANTO, REPUBLICAN STAFF DIRECTOR

United States Senate

COMMITTEE ON SMALL BUSINESS & ENTREPRENEURSHIP
WASHINGTON, DC 20510-6350

July 2, 2002

BY FACSIMILE:

ORIGINAL VIA U.S. MAIL

The Honorable Timothy J. Muris
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chairman Muris:

In response to hundreds of complaints I received from small businesses concerning slotting allowances, I chaired two hearings in September of 1999 and 2000 before the Senate Committee on Small Business and Entrepreneurship (Committee) on slotting allowances and their impact on small businesses. The hearings were conducted after the Committee staff had conducted an extensive investigation into this business practice. The investigation included interviews of several hundred individuals nationwide.

After the first hearing in September 1999, the Committee requested that the General Accounting Office (GAO) conduct a study on the use of slotting allowances and other related fees in the retail grocery industry. Despite assurances from witnesses representing the retail grocery industry that the retailers would cooperate with the GAO study, the GAO was unable to obtain the promised cooperation.

At the conclusion of the second hearing in September 2000, the Committee called upon the Federal Trade Commission (FTC) to conduct its study on the impact of slotting fees in the grocery industry on small businesses because we believed the FTC would achieve a greater degree of cooperation from retail grocers. To facilitate your undertaking this study, I convinced my colleagues on the Senate Appropriations Committee to add \$900,000 to the FTC appropriation bill, which was spelled out in the Conference Report accompanying H.R. 4577, Commerce, Justice and State Appropriations for Fiscal Year 2001. In this legislation, Congress earmarked funds for the express purpose of enabling the FTC to collect, review and analyze data directly related to the use of slotting fees and other anti-competitive practices, that may enable dominant manufactures to unfairly preclude or impede small manufacturers from retail grocery industry.

On June 19, 2002, members of my Committee staff were briefed by FTC staff members regarding the Commission's ongoing review of slotting fees and anti-competitive practices. During the June 19 meeting, FTC staff advised my staff that their work is proceeding slowly on the collection of transaction data to complete this report. In light of the findings from the Committee's two hearings and its investigation, the need for increased attention on slotting allowances remains. Several aspects of the FTC's briefing have raised my concern.

First, the Committee is discouraged by the low level of cooperation from the retailers included in the FTC's study. The FTC staff indicated that only four out of nine retailers questioned in this study have been fully cooperative. This number is troubling in light of the large volume of testimony I have received from small manufacturers regarding the widespread practices involving slotting allowances.

Second, the Committee is troubled by the report by the FTC staff that they have been unable to gauge accurately the volume and prevalence of "pay to stay fees." Such fees were repeatedly cited by small manufacturers interviewed by my staff in preparation for the two hearings previously held on slotting. In fact, "pay to stay fees" were cited more often than any other form of slotting fee in our discussions with nearly 200 small businesses.

Indeed, the FTC's own arguments waged in *FTC v. H.J. Heinz Company and Milnot Holding Corporation*, wherein the FTC cites the "constant bidding that's going on to be on the shelf," and "the constant threat that they [manufacturers] will be replaced," as evidence that "pay to stay" payments from manufacturers to retailers are an integral and accepted practice in the retail grocery business. The acceptance by the FTC staff of the grocery retailers' claims that "pay to stay fees" are absent or insignificant raises my concern that retailers may be accepting allowances resembling "pay to stay" fees that are called by another name, such as "display allowances" or "placement allowances" or which are paid in the form of advertising allowances, volume discounts or other named forms of payment. Consequently, I think it critical that the FTC investigators ensure that there is a clear understanding and agreement upon the questions they pose and the answers supplied by the retailer grocers.

Third, the Committee has concerns about the quality and veracity of the information the FTC staff has received in its investigation. The discrepancies surrounding "pay to stay" fees are one indication of this problem. Additionally, there are significant discrepancies in reports of slotting allowances between retailers and manufacturers. While retailers have reported to the FTC that 20% to 50% of new products are placed on the shelves involve slotting fees, the manufacturers and food brokers have reported to the FTC that the real number lies somewhere between 80% and 90%. The size of this discrepancy is astounding and should raise a red flag that the truth is yet to be found.

The FTC staff offered that data collected concerning new product introductions does not differentiate between products that are new to the market and those that are repackaged or reformulated products already established in the marketplace. This commingling of new products and existing products could prevent any relevant determination of the use of slotting allowances. Consequently, it is essential that the FTC report differentiate between these two categories.

As a result of the above concerns, the Committee requests that the FTC obtain a validation for at least 10% of the information provided by retailers questioned in this study to help in determining the accuracy of their replies to the FTC. Additionally, the Committee would like the FTC to include salted snack foods as a sixth food category in the sampling of new products and its relation to slotting allowances.

The Honorable Timothy J. Muris

Chairman

Page 3

At the same time, the Committee will continue to explore its other concerns. We have already approached the IRS and inquired into the reporting and tax treatment of slotting allowances. Completion of the FTC's study is critical to help the Committee and the Congress understand better the true impact of slotting fees and other anti-competitive practices on the marketplace, the small business sector and, ultimately, the consumer.

Your assistance and cooperation with our efforts in completing this study is very much appreciated. If you have any questions regarding this matter, please contact me directly or have your staff contact the Committee's Republican Staff Director, Emilia DiSanto, at 202/224- .

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Bond", written in a cursive style.

Christopher S. Bond

Ranking Member